Supreme Court, U.S.
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Case No. 85-1540

IN THE SUPREME COURT OF

THE UNITED STATES

Term: October 1985

John Christopher Pracht,

Petitioner,

vs.

United States of America.

On Petition for Writ of Certiorari
from the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF OF PETITIONER TO MEMORANDUM IN OPPOSITION

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TABLE OF CONTENTS

1. Table of Authorities

Table of Cases.....ii

Table of Statutes ii

Table of other References.....ii

2. Argument..... 1

Table of Cases

1. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215(1963), p.2,7,8.

2. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342(1976),p.7,8.

3. United States v. Bagley, _U.S._, 105 S. Ct. 3375(1985), p.8.

Table of Statutes

1. 5 U.S.C. 552 .....p.1,9

2. 5 U.S.C. 552(b)(7)(D)....p.1,9,10,13

3. 5 U.S.C. 552(b)(7)(F)....p.13

Table of other References

1. 59 ALR Fed. 554, Confidential Source, p.10.

2. Legislative History, Texts and Other Documents, p.10

ARGUMENT

Respondent recites the government's version of the facts of this case and argues that petitioner has presented a factual issue and that the Federal Bureau of Investigation reports obtained pursuant to the Freedom of Information Act, 5 U.S. C. 552, do not on their face provide support for petitioner's contention that the government suppressed the existence of an informer because 5 U.S.C. 552(b)(7)(D) exempts information provided by both undercover operatives and other law enforcement agencies or private citizens.

Respondent alleges in the governments version of the facts that the government has repeatedly denied the existence of an informer in this case to counsel for the petitioner, the district court and the court of appeals. Such is not the case. The sole denial by the government regarding the existence of an

informer was made in the government's brief submitted to the court of appeals at page 17.

Respondent states in the government's version of the facts:

> Prior to trial, petitioner had requested the disclosure, under Brady v. Maryland, 373 U.S. 83(1963), of exculpatory materials in the possession of the prosecution, inclu-ing materials relating to the possible use by the government of a confidential informant (Pet. 22-23). While the government provided certain discovery materials to petitioner (Pet. 23), the prosecution explained that it had obtained no information from any informants in this case. (Resp. Mem. in Opp. 2, typewritten copy) (emphasis added)

Counsel for petitioner, and petitioner have no personal knowledge of any

explanation or representation by the prosecution prior to or during trial that the prosecution had not obtained any information from informants in this case. The respondent further states:

> After his conviction, petitioner moved for a new trial, stating his belief that Griffith had served as an informant and asserting that the government improperly had failed to disclose that fact. The government responded that petitioner had failed to establish the existence of an informant, and it assured both the district court and the court of appeals that there was in fact "no informant in this case" (Gov't C.A. Br. 17; see id. at 18). (Resp. Mem. in Opp. 2, typewritten copy.) (emphasis added)

Counsel for petitioner along with Thomas W. McAliley, of Miami, Florida

drafted, filed and served petitioner's post trial motions, and counsel for petitioner has absolutely no knowledge of any response by the government, either written or oral, to petitioner's post trial motions and absolutely no knowledge whatsoever of the government assuring the district court that there was not an informant in this case. Respondent correctly states that the government represented to the court of appeals that there was no informant in this case (Gov't C.A. Br. 17), but counsel is informed and believes that the government has never made any representations either to defense counsel for the petitioner or to the district court regarding the existence or non-existence of an informer in this case. Respondent cites page 18 of the government's brief submitted to the Court of Appeals to support respondent's

allegation that in response to petitioner's post trial motions the government assured the district court that there was not an informer in this case. (Resp. Mem. in Opp. 2, typewritten copy) Respondent is referring to a sentence on page 18 of the government's court of appeals brief in which the government contended that the prosecution denied the existence of an informer in response to petitioner's pretrial motion requesting disclosure of the existence of informers and cited "(R-78-80)" in support of that contention. That sentence states:

> In addition, the government has consistently denied the existence of any informant, even in response to the district court's order to disclose informers (R 78-80). (Gov't C.A. Br. 18.)

The record of the district court

does not contain any denial of the government regarding the existence of an informer. The government did cite "R 78-80" as supporting this contention as noted by the respondent in its reference to page 18 of the government's court of appeals brief, but "R 78-80" is a reference to the district court's order requiring the government to disclose the existence of informers (Gov't C.A. Br. 3, n.2, key to abbreviations of references in Gov't's brief) and is not a reference to such a denial by the government.

Respondent inaccurately argues that petitioner's contention "is a factual one" that the government made use of a confidential informant and improperly withheld his name from the defense" (Resp. Mem. in Opp. 2, typewritten copy). Petitioner's argument is not factual but rather is based on the facts of this case as applied to the precedents

established by this Court and is in two parts. First, petitioner submits that if the evidence disclosed during cross examination and in the police reports obtained during trial had been disclosed at a sufficient time prior to trial in response to petitioner's pre-trial motions and the district court's orders and developed by reasonably competent counsel, there is a reasonable probability the result would have been different. Petitioner submits that the government's failure to disclose this information prior to trial deprived the petitioner of material evidence necessary to develop and present a defense of entrapment and that the court of appeals' decision dismissing this issue as meritless conflicts with Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215(1963); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342

(1976); and United States v. Bagley, _U.S._, 105 S.Ct. 3375(1985). (Pet. 42-49) Second, petitioner submits that this case exemplifies why this Court should establish a clearly defined rule imposing strong sanctions against the prosecution when the prosecution deliberately suppresses requested information. It is the facts of this case that establish that the evidence obtained during trial demonstrate that an informer did exist despite the fact that the government remained silent and did not disclose the existence of an informer in response to petitioner's pre-trial motion to disclose the existence of informers and the district court's orders that the government promptly disclose to the defense: the existence of informers; any information favorable to the defense pursuant to Brady v. Maryland, supra, and United States v. Agurs, supra, and

any information or knowledge resulting from investigations of governmental agencies, either state or federal, which was pertinent or material to the defense or favorable to the petitioner. (Rec. of D.C. Doc. 41; Pet. 22-23, 49-54, A-18, A-19, A-26, A-28, A-29).

It is the record in this case which documents that dispositive evidence was deliberately suppressed by the prosecution, and that is the factual basis of petitioner's argument.

Respondent also argues that the F.B.I. records obtained by the petitioner pursuant to the Freedom of Information Act, 5 U.S.C. 552, which contain large sections of exempted material with the explanation that the material was exempted pursuant to 5 U.S.C. 552(b)(7)(D) which provides for exemption of the identity of and information provided by a "confidential source" do not on their

face support petitioner's argument because 5 U.S.C. (b)(7)(D) exempts both information provided by undercover operatives and private citizens or other law enforcement agencies providing confidential information. According to the legislative history of the 1974 amendments to the Freedom of Information Act the substitution of the term "confidential source" in 5 U.S.C. 552(b)(7)(D) was to clarify that both paid informers and the information they provided and other persons and the information they provided would be exempted if the information was provided under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. 59 ALR Fed. 554, citing in n.1 Legislative History, Texts and Other Documents, p. 230. It is true that some courts have extended the exemption afforded to other

persons to whom an express assurance of confidentiality has been made to include other law enforcement agencies. However, the government does not assert that a person other than an undercover operative or another police agency provided the exempted information with an assurance of confidentiality, and the police reports obtained during trial clearly demonstrate that only an individual who was involved in the venture could have provided the government with the information utilized in its investigation.

The ranch was under intense surveillance from January 14-16, 1983(the venture took place between January 14-15, 1983) with this surveillance including extensive searches, the issuance of subpoenas and the making of detailed records and diagrams. On January 17, 1983 tire impressions were photographed and measured on the ranch airstrip and

the northern part of the ranch was searched for a "stash". On January 21, 1983 the F.B.I. knew the location and markings on the specific 55 gallon drums used to fuel the airplane and requested that they along with the brown van be processed for fingerprints and that gasoline samples be taken from the drums. (Pet. 20-21, 27-28.) According to the trial testimony Hoback did not provide information to the F.B.I. until May of 1983.(Pet. 24.) Furthermore, Hoback was not present on the ranch at the time of the venture (Pet.20-21), and was not informed of the date of the venture or specific details of the venture. (Pet. 29) Only Griffith who directed the venture, provided the ranch and gasoline, invested $10,000.00 in the venture and was not a co-defendant could have provided the information utilized in the investigation. (Pet. 6-14, 19,21,37.)

It is utterly absurd and impossible to believe that the police agencies obtained such specific information from a disinterested and uninvolved person who had been given an assurance of confidentiality or from other police agencies unless those police agencies themselves had obtained the information from an informer.[1]

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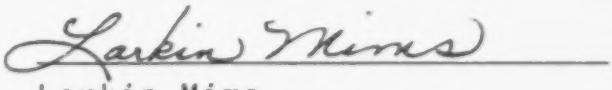
[1] Since the petition in this matter was filed petitioner has received additional information requested in June of 1985 pursuant to the Freedom of Information Act which is from the files of the Drug Enforcement Administration and much of which is exempted pursuant to 5 U.S.C. 552(b)(7)(D) and other portions of which are exempted pursuant to 5 U.S.C. 552(b)(7)(F) which provides that investigatory records compiled for law enforcement purposes, the disclosure of which would endanger the life or physical safety of law enforcement personnel may not be made available to the public.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,



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